

CHAPTER 16 EVIDENCE

Evidence is something presented at trial to prove or disprove the existence of an alleged fact. *Black’s Law Dictionary*. Not all facts, recollections, records, opinions, or physical items are evidence. Each of the mentioned proofs must meet certain legal standards before they can be called evidence. In determining whether an offered proof is evidence, the court determines if the proof meets the legal threshold of admissibility, but not whether the proof is conclusive, credible, believable, or true. The factual credibility of the evidence is determined by the fact finder after hearing all the evidence. Rule 104, T.R.E.*

The most common form of evidence is oral statements of witnesses based on personal knowledge. In limited circumstance, evidence can be opinions of a witness. Evidence can also be physical items, such as records, photos, recordings, etc. Demonstrative evidence is proof offered as illustrations or explanations of the witness’s recollections and perceptions. This includes physical demonstrations by the witness, drawings created during or before testimony, experiments, lists, items that are introduced that look like items observed by the witness, or any other item that demonstrates other properly introduced evidence.

**Please note, the Texas Rules of Evidence (T.R.E.), referenced in this chapter, are available on the OCA website (linked here).*

1. When Do the Texas Rules of Evidence Apply?

Checklist 16-1	Script/Notes
<input type="checkbox"/> 1. The Rules of Evidence apply in all trials before the court or a jury. <input type="checkbox"/> a. They apply in all adversary hearings before the court except: <input type="checkbox"/> (1) Preliminary hearings to determine if competency is an issue; <input type="checkbox"/> (2) Initial appearance before a magistrate for a hearing and setting of bail; <input type="checkbox"/> (3) Applications for search or arrest warrants; <input type="checkbox"/> (4) Pre-trial hearings on the admissibility of confessions or other evidence outside the presence of the jury; and/or <input type="checkbox"/> (5) Proceedings in a direct contempt determination.	<p>Art. 45.011/45A.004, C.C.P.</p> <p>Rule 101(e)(3)(B), T.R.E.</p> <p>Rule 101(e)(3)(C), T.R.E.</p> <p>Rule 101(e)(3)(E), T.R.E.</p> <p>Rules 101(e)(1) and 104(a), T.R.E.</p> <p>Rule 101(e)(3)(F), T.R.E. See Chapter 14 in this book.</p>

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| <ul style="list-style-type: none"> □ 2. The rules of privilege always apply. A right of privilege is the right to refuse to testify or answer certain questions. The privileges recognized by the Rules of Evidence, in addition to the constitutional privilege against self incrimination, include the following: <ul style="list-style-type: none"> □ a. The lawyer-client privilege:

Attorneys, their staff, clients of an attorney, and representatives of the client, may all refuse to disclose information concerning lawyer-client communications made pursuant to lawful representation. □ b. The spousal privilege: <ul style="list-style-type: none"> □ (1) The spouse has a privilege not to take the stand, except in cases of domestic violence. □ (2) The spouse can also refuse to answer questions concerning communications made during the marriage, unless they were made in furtherance of a crime or in cases of domestic violence. The marital communications privilege survives both death and divorce. □ c. The communications to a clergy member privilege. □ d. There is no physician-patient privilege in criminal proceedings, except a limited privilege for those voluntarily seeking alcohol or drug abuse treatment. □ e. The journalist’s qualified testimonial privilege in criminal proceedings. □ 3. Certain information as well as certain communications are privileged: <ul style="list-style-type: none"> □ a. A person’s vote in any election; and | <p>Rule 503, T.R.E.</p>
<p>Rule 504, T.R.E.</p>
<p>Art. 38.10, C.C.P.</p>

<p>Rule 505, T.R.E.</p>
<p>Rule 509, T.R.E.</p>
<p>Art. 38.11, C.C.P.</p>

<p>Rule 506, T.R.E.</p> |
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- b. Privileges created by statutes that require certain records be kept, except where the privilege is asserted to conceal fraud.

- 4. Special statutory rules of evidence are used in hearings on sentencing or revocation.

Rules 502 (Required Reports),
507 (Trade Secrets), and 508
(Informers Identity), T.R.E.

Art. 38.37, C.C.P. (Evidence of
Extraneous Offenses or Acts)

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2. Ways to Prove a Fact

Checklist 16-2	Script/Notes
<p><input type="checkbox"/> 1. Judicial notice:</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. Certain matters may be deemed by the court to be self-evident, well known, or conclusively proven so that the court can simply declare them established by “judicial notice” at the request of a party or on its own initiative.</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. The court may take judicial notice when:</p> <p style="padding-left: 40px;"><input type="checkbox"/> (1) A fact is “generally known in the jurisdiction;”</p> <p style="padding-left: 40px;"><input type="checkbox"/> (2) A fact is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned;” or</p> <p style="padding-left: 40px;"><input type="checkbox"/> (3) The fact in issue is the existence or wording of a municipal or county ordinance or other such government regulation, provided the movant present the court with a proper copy of such ordinance.</p> <p style="padding-left: 20px;"><input type="checkbox"/> c. The court must allow both sides to be heard when taking judicial notice.</p> <p><input type="checkbox"/> 2. By the testimony of competent witnesses.</p> <p><input type="checkbox"/> 3. By the introduction of properly predicated and introduced records or other physical evidence.</p> <p><input type="checkbox"/> 4. Arguments by attorneys, parties, witnesses, or any statements by others not sworn and examined are not evidence and not to be considered by the fact finder as evidence.</p> <p><input type="checkbox"/> 5. Plea bargains, plea negotiations, and plea discussions are not admissible.</p>	<p>Rule 201(c)-(d), T.R.E.</p> <p>Rule 201(b), T.R.E.</p> <p>Rule 204, T.R.E.</p> <p>Rules 201(e) and 204, T.R.E.</p> <p>See Rule 601, T.R.E., concerning competency of witnesses.</p> <p>Rule 410, T.R.E.</p>

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3. How Objections are Made and Ruled on by the Court

Checklist 16-3	Script/Notes
<p><input type="checkbox"/> 1. Objections:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. Objections must be made by a party. Objections can never be made by a witness or the court. <input type="checkbox"/> b. The objection is made to the court and not to the opposing party, witness, or jury. <input type="checkbox"/> c. The objection should be respectful and not argumentative. <input type="checkbox"/> d. The objection should be timely made. The objection must be made when the objectionable question or answer is made or given. <input type="checkbox"/> e. Objections must be made every time a matter is raised to preserve the matter for review on appeal unless the court grants a “running objection” on the record, outside the presence of the jury. <input type="checkbox"/> f. Objections that raise matters important to the court’s ruling, but not appropriate for the jury to hear, should be made outside the earshot or presence of the jury. <ul style="list-style-type: none"> <input type="checkbox"/> (1) Removal may be made at either party’s request or on the court’s own suggestion. 	<p>A defendant cannot object if represented by counsel.</p> <p>State the legal basis for objection to the proffered question or answer</p> <p>Rule 103(a), T.R.E. Proper objection: “Your Honor, I object to that <u>question/answer</u> because it is <u>hearsay/not relevant/a leading question/ etc.</u>”</p> <p><i>Ethington v. State</i>, 819 S.W.2d 854 (Tex. Crim. App. 1991).</p> <p>Rule 103(c), T.R.E.</p>
<p><input type="checkbox"/> 2. Responses:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. The court has broad discretion in ruling on objections. <input type="checkbox"/> b. The court has no obligation to listen to responses, but should do so if hearing the response would aid the court in making a proper ruling. 	<p>Rule 103, T.R.E.</p> <p>Proper response: “Your Honor, may I respond to the objection?”</p>

- c. Remember that responses are often best made outside of the jury’s hearing.
- 3. Offers of proof:
 - a. To properly consider excluded evidence on appeal, the reviewing court must be able to study that evidence.
 - b. The party tendering the excluded evidence is responsible for getting the excluded evidence into the record.
 - c. The offer of proof is always made outside the presence of the jury.
 - d. The party making the offer of proof may be granted substantial latitude in the means of producing said evidence.
 - e. The offer of proof may be made by:
 - (1) Sworn statement;
 - (2) Placement in the record of a physical object not admitted into evidence;
 - (3) Questions to and answers of a witness; or
 - (4) A summary by counsel of the questions and answers expected.
 - f. Offers of proof do not have to be made at the time of the objection and may be made at any time during the trial, so as to facilitate an orderly presentation of the evidence at trial.

Dopico v. State, 752 S.W.2d 212 (Tex. App.—Houston [1st Dist.] 1988, pet. ref’d); and Rule 103(a)(2), T.R.E.

This is obligatory if requested. Rule 103(c), T.R.E.

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4. Hearsay

Checklist 16-4	Script/Notes
<input type="checkbox"/> 1. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.	Rule 801(d), T.R.E.
<input type="checkbox"/> 2. Hearsay testimony is not admissible unless it falls under an exception to the hearsay rule.	Rule 802, T.R.E.
<input type="checkbox"/> 3. Hearsay includes non-verbal conduct if intended as a substitute for verbal expression.	Rule 801(a), T.R.E.
<input type="checkbox"/> 4. To be hearsay, the statement must be offered to prove the content of the statement. If the statement is offered to prove that the statement was made and not that the statement is true, it is not hearsay.	
<input type="checkbox"/> 5. Statements defined by the rules as not hearsay:	Rule 801(e), T.R.E.
<input type="checkbox"/> a. Prior statements by the witness.	
<input type="checkbox"/> b. Statements by a party offered against that party.	
<input type="checkbox"/> 6. Statements that are hearsay, but admissible under an exception to the hearsay rule:	
<input type="checkbox"/> a. A present sense impression.	Rule 803(1), T.R.E.
<input type="checkbox"/> b. Excited utterances.	Rule 803(2), T.R.E.
<input type="checkbox"/> c. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition.	Rule 803(3), T.R.E.
<input type="checkbox"/> d. A statement made for the purpose of medical diagnosis or treatment.	Rule 803(4), T.R.E.
<input type="checkbox"/> e. A prior written record by the witness about matters that he or she once had personal knowledge, but now is unable to recall if such a record was reliably created when the matters were fresh in his or her mind.	Rule 803(5), T.R.E.

<ul style="list-style-type: none"> <input type="checkbox"/> f. Regularly kept business, public, official, medical, commercial, or family records must: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Be kept in the regular course of these other enterprises; <input type="checkbox"/> (2) Be recorded by persons with personal knowledge; and <input type="checkbox"/> (3) Have some indicia of trustworthiness. <input type="checkbox"/> g. Authenticated documents over 20 years old. <input type="checkbox"/> h. Learned treatises when used to question experts. <input type="checkbox"/> i. Reputation testimony. <input type="checkbox"/> j. Judgments of previous conviction against the defendant. <input type="checkbox"/> k. Statements made by the declarant that were against his or her monetary, legal, or social interest. <input type="checkbox"/> l. Statements made exposing the declarant to criminal liability must be corroborated. <input type="checkbox"/> 7. Some hearsay statements are admissible only if the declarant is not available as a witness due to privilege, refusal to testify, lack of memory, death or infirmity, or lack of the witness's attendance at trial due to no fault of the party seeking the testimony. The following are not excluded from evidence if the declarant is unavailable as a witness: <ul style="list-style-type: none"> <input type="checkbox"/> a. Former testimony where both parties were able to fully cross-examine the witness. <input type="checkbox"/> b. Dying declarations of the declarant. <input type="checkbox"/> c. Statement of personal or family history. 	<p>Rule 803(6)-(15), and (17), T.R.E.</p> <p>Rule 803(16), T.R.E.</p> <p>Rule 803(18), T.R.E.</p> <p>Rule 803(19)-(21), T.R.E.</p> <p>Rule 803(22), T.R.E.</p> <p>Rule 803(24), T.R.E.</p> <p>Rule 803(24), T.R.E.</p> <p>Rule 804, T.R.E.</p> <p>Rule 804(b)(1), T.R.E.</p> <p>Rule 804(b)(2), T.R.E.</p> <p>Rule 804(b)(3), T.R.E.</p>
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| ❑ 8. If a hearsay statement comes into evidence, the credibility of the declarant of the hearsay statement is put at issue and may be challenged by other evidence. | Rule 806, T.R.E. |
| ❑ 9. Hearsay within hearsay is not excluded if an exception is provided for each part of the combined statement. | Rule 805, T.R.E. |

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5. Objections Concerning Nature of Questions, Answers, or Courtroom Behavior

Checklist 16-5	Script/Notes
<p><input type="checkbox"/> 1. Leading questions are questions that suggest the answer desired by the questioner. Leading questions are proper and preferred during cross-examination or during any examination of a hostile witness.</p>	<p>Rule 611(c), T.R.E.</p>
<p><input type="checkbox"/> 2. Scope of cross-examination: A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.</p>	<p>Rule 611(b), T.R.E.</p>
<p><input type="checkbox"/> 3. Narrative answers - All examinations should be done in a question and answer format. Failure to follow this format causes opposing counsel to be unable to object to particular matters. Testimony that moves from topic to topic without interspersed questions is narrative and improper. However, in some situations, the court may permit narrative responses.</p>	
<p><input type="checkbox"/> 4. Badgering the witness: A trial should be a formal and civilized proceeding. Undue dramatics, improper aggression, or just plain bad manners may be controlled by the court on a proper objection. The court, if necessary, may act on its own to stop certain conduct.</p>	<p>Rule 611(a), T.R.E.</p>
<p><input type="checkbox"/> 5. Sidebar comments and arguing with the witness: During testimony, the attorney’s and/or pro se defendant’s role is to ask questions; they are not sworn and they may not testify. Counsel and pro se defendants should not be allowed to comment on witness’ answers, opposing counsel’s questions, or the court’s rulings in a verbal or non-verbal fashion. Counsel and pro se defendants must convey the ideas they wish to express to the jury through proper questions and during closing arguments. Objections, as noted earlier, should be addressed to the court and not to the witness, opposing counsel, pro se defendant, or jury.</p>	<p>An example of sidebar comments would include: “Oh, I’m sure that is what you saw.” “Please, Your Honor, that is such a stupid question.” “Objection . . . Like he’s never going to sustain one of my objections.”</p>

- ❑ 6. Non-responsive answers: The court should require witnesses to answer proper, clearly stated questions as asked. During cross-examination, witnesses should be limited to answering questions as asked.
- ❑ 7. The court shall exercise reasonable control over witnesses and the presentation of evidence. The efficient presentation of evidence and actual ascertainment of the truth should be the constant goals of the court.
- ❑ 8. Ethically, the court must require order and decorum in all proceedings. These objections are all based on conduct rather than content and may provide the court with a tool to control courtroom behavior.

To properly make this objection, counsel must ask clear, simple questions that do not call for an explanation.

Rule 611(a), T.R.E.

Canon 3B(3), *Texas Code of Judicial Conduct*

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6. Objections to the Introduction of Physical Evidence

Checklist 16-6	Script/Notes
<p><input type="checkbox"/> 1. Predicate: Before introduction of a piece of physical evidence, the party offering the evidence must establish certain preliminary facts:</p> <p style="padding-left: 40px;"><input type="checkbox"/> a. The item is authentic; and</p> <p style="padding-left: 40px;"><input type="checkbox"/> b. If the item is perishable or alterable, the party offering the evidence must show either that the evidence has been in a secure “chain of custody” or that the item has not been altered or changed since it was gathered.</p> <p><input type="checkbox"/> 2. Photographs and recordings must be shown to accurately reflect what the witness initially observed. If such testimony is not available, photographs and recordings are admissible under the rules in Step 1 above.</p> <p><input type="checkbox"/> 3. Demonstrative evidence need only be shown to be helpful to the jury, and be explained by the witness.</p>	<p>For a quick and complete listing of proper predicates, please refer to <i>Predicates</i> published by the Texas District and County Attorneys Association (512.474.2436).</p>